IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14089 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE H.K.RATHOD

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE EXECUTIVE ENGINEER (STORES) & 1 - Petitioner(s)
Versus
HARSHA M. JANI - Respondent(s)

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Appearance :
Mr.Shivang Shukla AGP for Petitioners
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 13/06/2007

ORAL JUDGMENT

1. Heard learned AGP Mr. Shivang Shukla for the petitioners.

2. Through this petition under Article 227 of the Constitution of India, petitioner has challenged the award of Labour Court, Ahmedabad in Reference No. 679 of 1997 dated 21st July, 2006 wherein the labour court has partly allowed the reference, granted reinstatement with continuity of service without back wages for interim period.

3. During the course of hearing, learned AGP Mr. Shukla raised contention that the respondent has not completed 240 days continuous service within the year as required under section 25(B) of the ID Act, 1947. He also submitted that from 21st September, 1983 to 20th March, 1984, only 120 days continuous service has been rendered by the workman and, therefore, the labour court has committed gross error in granting benefit in favour of the workman. He also submitted that the respondent has not produced any documentary evidence on record to prove completion of 240 days continuous service before the labour court and, therefore, labour court has committed gross

error in granting relief in favour of the workman. He also submitted that there is no termination order issued by the petitioner but the respondent workman herself has not been reporting for work and stopped at her own from reporting duty and, therefore, it is a case of abandonment of job and, therefore, labour court should not have granted relief in favour of the workman. Except that, no other contention has been raised by learned AGP Mr. Shukla before this Court and no decision has been cited by learned AGP Mr. Shukla before this Court in support of his aforesaid contentions.

4. I have considered the submissions made by the learned AGP Mr. Shukla before this Court. I have also perused the award in question made by the labour court.

5. As per the statement of claim filed by the respondent workman before the labour court, she was performing duties as a clerk in the

establishment of the petitioner since four years. On 21.4.87, on completion of maternity leave, she had gone for resuming duties but she was not taken on job and thereby she has been retrenched. As per her statement of claim filed before the labour court, while terminating her services, she has not been given notice or notice pay in lieu thereof and was also not paid retrenchment compensation. Therefore, according to the respondent workman, she remained in service for more than four years continuously and completed 240 days and section25F has not been followed while terminating her services and it is a case of termination of service and not abandonment of job and, therefore, complaint was made before the Assistant Labour Commissioner which was referred to for adjudication to the labour court wherein reply was filed by the petitioner at Exh. 11 inter alia contending that the appointment of the petitioner was not according to the rules and, therefore, respondent is not entitled back door entry in the establishment of the petitioner.

Respondent was cross examined before the labour court at Exh. 13 as her evidence was cross examined by the petitioner. Before the labour court, witness for the petitioner namely Gunvantbhai Hargovinddas at Exh. 39 and his evidence was cross examined by the learned Representative for the workman. Thereafter, mater was examined by the labour court on the basis of the record where the labour court come to the conclusion that Harshaben Madhusudan Jani and Harshaben Mohanbhai Jani are one and same person on the basis of Exh. 39/2 produced by the petitioner wherein it was made specifically clear that in muster, while making payment, presence alone which is being marked in the name of a person is being examined and the name of father or husband is not being looked into. Function was to verify that the presence is not marked by any new person. Thus this letter explains that it makes no difference whether person is Harsha Madhusudan Jani or Harsha Mohanlal Jani but to see that somebody else may not be there.

Therefore, labour court has come to the conclusion that the husband of the respondent is having two names one Madhusudan and the other is Mohanbhai. Before the labour court, petitioner has not produced relevant record of working days of the respondent for the period of four years including the name of Harshaben Madhusudan Jani and Harshaben Mohanbhai Jani. Before the labour court, petitioner has not produced any muster roll, pay register which can be considered by the labour court against the evidence of the respondent workman. Further, it is not the case of the petitioner that at the time of engaging the respondent workman, appointment order was issued in favour of the respondent workman. No written order of appointment was issued. It is also not the case of the petitioner that the wage slip or identity card was issued by the petitioner in favour of the respondent workman. Copy of the muster register has also not been issued to respondents. So, none of the documents were supplied by the petitioner to the respondent

workman so as to enable the respondent workman to prove completion of 240 days in a year by producing some documents. Now petitioner wants documentary proof from the respondent workman raising contention that the workman has not produced any documentary evidence to prove 240 days continuous service in a year. I fail to understand on what basis the petitioner is making submission demanding documentary proof from the respondent workman which was admittedly not supplied by the petitioner to the workman while she was in service, therefore, in such circumstances, when there was no documentary proof supplied by the petitioner from the date of engagement of workman till the date of termination namely muster card, presence card, pay slip and identity card, then, the workman remain helpless to prove 240 days continuous service by producing documentary evidence, then, the workman is having only one option to give oral evidence before the labour court which was done by the respondent before the labour court by

stepping into the witness box and her oral evidence was cross examined by the petitioner. Therefore, if the petitioner was disputing the oral evidence of the respondent workman, then, for controverting the same, petitioner ought to have produced whole service record including muster, presence cards and pay register of the respondent workman before the labour court which has not been done by the petitioner before the labour court as if there is no duty or obligation on the part of the petitioner to disprove the oral evidence of workman concerned. Therefore, in view of the aforesaid back ground, the labour court has come to the conclusion that no documentary evidence which was in custody of the petitioner was produced by petitioner before the labour court and, therefore, considering the oral evidence of the workman not controverted by petitioner by producing documentary evidence, adverse inference was drawn by the labour court against the petitioner and according to my opinion, labour court has not committed any error

while doing so which would require interference of this court in exercise of the powers under Article 227 of the Constitution of India.

6. The Labour Court has relied upon the apex court decision delivered by Three Judges Bench in case of RM Yellatti versus The Assistant Executive Engineer reported in 2005 (9) SCALE page 139. Relevant paragraph 17, 18 and 19 of the said decision are reproduced as under:

> “17. Analyzing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked for 240 days in a given year. This burden is discharged only upon the workmen stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of

services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non production of muster rolls per se without any plea of suppression by the claimant workmen will not be the ground for the tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down basic principle, namely, that the High Court under Art. 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse.

This exercise will depend upon facts of each case.

18. Now applying the above decision to the facts of the present case, we find that the workman herein had stepped in the witness box. He had called upon the management to produce the nominal muster rolls for the period commencing from 22/11/1988 to 20/6/1994. This period is the period borne out the certificate (Ex. W1) issued by the former Asstt. Executive Engineer the evidence in rebuttal from the side of the management produce five nominal muster rolls (NMRs), out of which 3 NMRs, Ex.M1, Ex.M2 and Ex.M3, did not even relate to the concerned period. The relevant NMRs produced by the management were Ex. M4 and Ex. M5, which indicated that the workmen had worked for 43 days during the period 21/1/1994 to 20/2/1994 respectively. There is no explanation from the side of the management as to why for the remaining period the nominal muster rolls were not produced. The labour Court has rightly held that there is nothing to disbelieve the certificate (Ex.W1). The High Court in its impugned judgment has not given reasons for

discarding the said certificate. In the circumstance, we are of the view that the Division Bench of the High Court ought not to have interfered with the concurrent findings of fact recorded by the Labour Court and confirmed by the learned Single Judge vide order dated 7/6/2000 in writ petition No. 17636 of 2000. This is not, therefore, a case where the allegations of the workmen are founded merely on an affidavit. He has produced cogent evidence in support of his case. The workmen was working in SD 1, Athani and Ex. W1 was issued by the former Asstt. Executive Engineer, Hipparagi Dam Construction Division No. 1, Athani-591304. In the present case, the defence of the management was that although Ex. W1 refers to the period 22/11/1988 to 20/6/1994, the workmen had not worked as a daily wager on all days during that period. If so, the management was duty bound to produce before the Labour Court the nominal muster rolls for the relevant period, particularly when it was summoned to do so. We are not placing this judgment on the shifting of the burden. We are not placing this case on drawing of adverse inference. In the present case,

we are of the view that the workmen had stepped in the witness box and his case that he had worked for 240 days in a given year was supported by the certificate (Ex.W1). In the circumstances, the Division Bench of the High Court had erred in interfering with the concurrent findings of fact.

19. Before the concluding, we would like to make an observation with regard to cases concerning retrenchment/termination of services of daily waged earner, particularly those who are appointed to work in Government departments. Daily waged earners are not regular employees. They are not given letters of appointments. They are not given letters of terminations. They are not given any written document which they could produce as proof of receipt of wages. Their muster rolls are maintained in loose sheets. Even in cases, where registers are maintained by the Government departments, the officers/clerks making entries do not put their signatures. Even where signatures of clerks appear, the entries are not countersigned or certified by the appointing authorities. In such cases, we

> are of the view that the State Governments should take steps to maintain proper record of the services rendered by the daily wagers; that these records should be signed by the competent designated officers and that at the time of termination, the concerned designated officers should give certificates of the number of days which the labourer/daily wager has worked. This system will obviate litigations and procuniary liability for the Government."

7. Recently, on 8th March, 2007, apex court has considered same issue in case of M/s. Sriram Industrial Enterprises Ltd. Versus Mahak Singh & Ors. reported in 2007 (3) Supreme Today page 553. In the said decision, the apex court has considered the decision in case of Range Forest Officer v. ST Hadimani reported in (2002) 3 SCC 25 and other all relevant decisions including the decision in case of Surendranagar District Panchayat versus Dahyabhai Amarsinh (2005) 8 SCC 750. In the said decision, the apex court has also considered the earlier three Judges decision

of the apex court in case of RM Yellatty v. Assistant Executive Engineer (2006) 1 SCC 106. Ultimately, after considering all relevant decisions in respect of onus of proof, whom to prove 240 days continuous service and how to discharge such burden by the workman and presumption of non production of documents by the employer. Relevant observations made by the apex court in para 34 of the said decision are reproduced as under:

> “34. Having correctly interpreted the provisions of Section 6N of the UP Act, the High Court rightly drew an adverse presumption for non-production of the Attendance Registers and the Muster Rolls for the years 1991 onwards. The best evidence having been withheld, the High Court was entitled to draw such adverse inference. The views expressed by this Court on the question of burden of proof in case of range Forest Officer's case (supra) were watered down by the subsequent decision in R.M. Yellatty's case (supra)and in our view the workman had discharged

their initial onus by production of the documents in their possession.“

8. In the same decision, in para 23 of the judgment, apex court observed as under while considering the decision in case of RM Yellatty's v. Assistant Executive Engineer (supra)”

“23.Regarding Mr. Desai's submissions that this Court had consistently laid down that it is for the workmen to prove that they had worked for 240 days in a calendar year, Mr. Viswanathan submitted that this Court had in the case of RM Yellatty vs. Assistant Executive Engineer, reported in (2006) 1 SCC 106, observed as under:

““17. Analyzing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforestated judgments, we find that this court has repeatedly taken the view that the burden of proof is on the claimant to show that he had worked

for 240 days in a given year. This burden is discharged only upon the workmen stepping in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily waged earner, there will be no letter of appointment or termination. There will also be no receipt or proof of payment. Thus in most cases, the workman (claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment or termination, if any, the wage register, the attendance ultimately would depend thereafter on facts of each case. The above decisions however make it clear that mere affidavits or self serving statements made by the claimant/workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments further lay down that mere non production of muster rolls per se without any plea of suppression by the claimant workmen will not be the ground for the tribunal to draw an adverse inference against the

> management. Lastly, the above judgments lay down basic principle, namely, that the High Court under Art. 226 of the Constitution will not interfere with the concurrent findings of fact recorded by the labour court unless they are perverse. This exercise will depend upon facts of each case."

9. In view of the aforesaid observations made by the apex court in M/s. Sriram Industrial Enterprises Ltd. v. Mahak Singh & Ors., 2007 (3) Supreme Today page 553, and also considering the facts of the case before hand, where evidence was led by the respondent workman proving the fact that she was in continuous service for four years and completed 240 days continuous service and her services were terminated by the petitioner when she reported for duty after completion of maternity leave by not permitting her to resume the duty which amounts to termination. Therefore, contentions raised by the learned AGP Mr. Shivang Shukla that the respondent herself has abandoned job is not correct and cannot be accepted because

if the respondent was not reporting for duty, then, in that case, it is the bounden duty of the petitioner to issue show cause notice calling upon the respondent to resume for duty and also to call upon the respondent to show cause why she has not been reporting for duty for such a long period. No such procedure has been adopted by the petitioner. No notice was served by petitioner on the respondent and, therefore, contention raised by learned AGP Mr. Shukla that it is a case of abandonment of duty cannot be accepted and same is therefore rejected.

10. This aspect has been considered by the labour court in issue no.2 that if the case of the petitioner is to be believed that the workman has left the job at her own, then for that also, considering the misconduct, petitioner was required to issue notice calling upon her to explain why she has not been reporting for duty but no such procedure was followed by the petitioner according to the decision in case of

State of Gujarat versus Jitendra M. Raval 2005 (106) FLR 97. No correspondence was made by the petitioner with the respondent in that regard and, therefore, labour court was right in not believing this contention of the petitioner. In doing so, labour court has not committed any error warranting interference of this court under Article 227 of the Constitution of India.

11. The Labour Court has considered that the termination order is bad and violative of section 25F of the ID Act, 1947 and thereafter, considered aspect of back wages, whether the workman is entitled for back wages for interim period or not. Considering the delay in raising of an industrial dispute on the part of the workman, once matter has been filed by respondent before this court, labour court has not granted any amount of back wages and granted only reinstatement with continuity of service without back wages for interim period. Aforesaid observations have been made by this court after

perusing the award passed by labour court and considering the submissions made by the learned AGP Mr. Shukla, therefore, according to my opinion, respondent has completed 240 days continuous service in a year by leading evidence and that evidence of the workman was not controverted by the other side namely petitioner by producing documentary evidence contrary to the evidence of workman and therefore, labour court was right in drawing an adverse inference against the petitioner that if it would have been produced by the petitioner, it would have gone against the petitioner and, that is why, it has not been produced by petitioner from its custody. According to my opinion, in the facts and circumstances of this case, labour court has not committed any error in doing so. Labour court was right in coming to the conclusion that the termination of workman was violative of section 25F of the ID Act, 1947 and, therefore, it void ab initio.

12. Learned AGP Mr. Shukla has not been able to point out any infirmity in the award. While exercising powers under Article 227 of the Constitution of India, this court cannot act as an appellate court. This Court cannot disturb the findings of fact even if two views are possible in exercise of powers under Article 227 of the Constitution of India. Therefore, according to my opinion, there is no substance in this petition and same is required to be dismissed. Same is, therefore, dismissed in limine.

(H.K. Rathod,J.)

Vyas